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No. _____

In The Supreme Court of the United States

CHRISTOPHER T. LIZZI,

Petitioner,

v.

WMATA, ROBERT ALEXANDER, CHARLES THOMAS, PHILLIP WALLACE, AL McCOY, ANTHONY JOHNSON DENISE KURTZ (as personal representative of the estate of Michael Kurtz), and JACK BYRD,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. DOES THE CONGRESSIONALLY – APPROVED INTERSTATE COMPACT CREATING THE WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY ("WMATA"), BY STATING THAT WMATA MAY "SUE AND BE SUED" AND THAT UNITED STATES DISTRICT COURTS HAVE JURISDICTION OVER SUITS BROUGHT AGAINST WMATA, WAIVE ELEVENTH AMENDMENT IMMUNITY?

II. DOES THE FAMILY AND MEDICAL LEAVE ACT OF 1993 (THE "FMLA") ABROGATE ELEVENTH AMENDMENT IMMUNITY?

III. DOES THE ELEVENTH AMENDMENT SHIELD STATE OFFICERS FROM LIABILITY IN THEIR INDIVIDUAL CAPACITY FOR FMLA VIOLATIONS?

IV. IF A COMPLAINT DOES NOT SPECIFY THE CAPACITY – INDIVIDUAL OR OFFICIAL - IN WHICH A STATE EMPLOYEE IS BEING SUED, SHOULD A COURT REVIEW THE "COURSE OF PROCEEDINGS" TO RESOLVE ANY CONFUSION?

LIST OF PARTIES

The Petitioner is Christopher T. Lizzi.

The Respondents are WMATA, Robert Alexander, Charles Thomas, Phillip Wallace, Al McCoy, Anthony Johnson, Dennise Kurtz (as personal representative of the estate of Michael Kurtz), and Jack Byrd.

The United States of America intervened in the proceedings in the District Court, but did not participate in the Fourth Circuit proceedings. 28 U.S.C. § 2403(a) may apply. The Fourth Circuit did not, pursuant to 28 U.S.C. § 2403(a), certify to the Attorney General the fact that the constitutionality of an Act of Congress was drawn into question. The notifications required by Rule 29.4(b) have been served.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Christopher T. Lizzi respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on June 20, 2001 in order to review the important issues presented herein.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit in Lizzi v. Alexander, et al., 255 F.3d 128, 201 U.S. App. LEXIS 13759 (4th Cir. 6/20/01), is set forth in the Appendix hereto. App. 3a-17a.

The Memorandum Opinion of the United States District Court for the District of Maryland (Southern Division) in Lizzi v. WMATA, et al. is unreported and is set forth in the Appendix hereto. App. 20a-32a.

BASIS FOR JURISDICTION

The final judgment of the United States Court of Appeals for the Fourth Circuit affirming in part, and reversing in part, the decision of the United States District Court for the District of Maryland (Southern Division) was entered on June 20, 2001. App. 3a-17a. On July 17, 2001, the Court of Appeals denied the petition for rehearing and rehearing en banc. App. 1a-2a. This petition for a writ of certiorari is filed within ninety (90) days of that date. 28 U.S.C. § 2101(c).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Compact Clause of Article I, Section 10

> No State shall, without the Consent of Congress, enter into any Agreement or Compact with another State....

United States Constitution, Amendment XI

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

United States Constitution, Amendment XIV, Sections 1 and 5

> Section 1. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; no deny to any person within its jurisdiction the equal protection of the laws.
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

WMATA Compact, Section 12(a)
Md. Cts. & Jud. Proc. Code Ann. § 10204(12(a))

In addition to the powers and duties elsewhere described in this title, and except as limited in this title, the Authority may:
(a) sue and be sued....

WMATA Compact, Section 80
Md. Cts. & Jud. Proc. Code Ann. § 10204(80)

The Authority shall be liable for its contracts and for its torts and those of its directors, officers, employees and agents committed in the conduct of any proprietary function, in accordance with the law of the applicable signatory (including rules on conflict of laws), but shall not be liable for any torts occurring in the performance of a governmental function. The exclusive remedy for such breach of contracts and torts for which the Authority shall be liable, as herein provided, shall be by suit against the Authority. Nothing contained in this title shall be construed as a waiver by the District of Columbia, Maryland, Virginia and the counties and cities within the zone of any immunity from suit.

WMATA Compact, Section 81
Md. Cts. & Jud. Proc. Code Ann. § 10204(81)

> The United States District Courts shall have original jurisdiction, concurrent with the courts of Maryland, Virginia and the District of Columbia, of all actions brought by or against the Authority and to enforce subpoenas issued under this Title. Any such action initiated in a State or District of Columbia court shall be removable to the appropriate United States District Court in the manner provided by Act of June 25, 1948, as amended (28 U.S.C. 1446).

STATEMENT OF THE CASE

Petitioner Lizzi brought this FMLA action against respondents, WMATA and various WMATA supervisors, invoking 28 U.S.C. § 1331 as a basis for federal jurisdiction.

WMATA was created pursuant to the Compact Clause of the Constitution by a Congressionally-approved interstate compact among Maryland, Virginia, and the District of Columbia (the "Compact").

Section 12 of the Compact states that WMATA may "sue and be sued." Section 81 states that the United States District Courts shall have original jurisdiction of suits brought against WMATA.

Lizzi's complaint does not expressly state whether the supervisors were sued in their individual or official capacity. But during the "course of proceedings" following the compaint, the parties and the District Court expressly referred to the supervisors as individual-capacity defendants.

The District Court held that the Eleventh Amendment shields WMATA from Lizzi's FMLA claims. Specifically, after determining that Maryland and Virginia intended to confer Eleventh Amendment immunity on WMATA, the District Court held that §§ 12 and 81 of the Compact - the sue-and-be-sued and federal-court-venue clauses - do not waive Eleventh Amendment immunity and that the FMLA does not abrogate such immunity. App. 24a-30a. For these reasons, it granted WMATA summary judgment.

But the District Court denied the supervisors' summary judgment motion. It ruled that they can be held personally liable for FMLA violations and that the Compact confers no immunity on them. App. 30a-32a.

On interlocutory appeal, the Fourth Circuit affirmed in part and reversed in part. App. 3a-17a.

It affirmed the District Court's conclusions that §§ 12 and 81 of the Compact do not effect a waiver of Eleventh Amendment immunity and that the FMLA does not abrogate that immunity. App. 8a-11a.

On the former issue, the Fourth Circuit rejected Lizzi's argument that §§ 12 and 81 of the Compact waive Eleventh Amendment immunity under this Court's holdings in Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299 (1990), and Petty v. Tennessee-Missouri Bridge Comm., 359 U.S. 279 (1959), where this Court held that a consent to suit-clause, read together with federal-court-venue clause, waives an interstate-compact entity's Eleventh Amendment immunity. App. 9a-11a.

The Fourth Circuit found that another Compact provision - § 80 - renders Feeney and Petty inapplicable. App. 10a-11a. Section 80 states in relevant part:

> [WMATA] shall be liable for its contracts and for its torts and those of its Directors, officers, employees and agents committed in the conduct of any proprietary function, in accordance with the law of the applicable signatory (including rules on conflict of laws), but shall not be liable for any torts occurring in the performance of a governmental function. Md. Cts. & Jud. Proc. Code Ann. § 10-204(80).

While Lizzi vigorously protested that since § 80 refers only to claims arising under the "law of the applicable signatory," it applies only to state law claims – and not his FMLA claim, the Fourth Circuit disagreed, stating that § 80 delineates the entire extent to which WMATA's immunity is waived. App. 11a. It relied principally on the District of Columbia Circuit's holding in Morris v. WMATA, 781 F.2d 218, 222 n.3 (D.C. 1986), App. 10a-11a, even though Morris predated Feeney and didn't consider Petty.

Having rejected Lizzi's waiver arguments, the Fourth Circuit addressed abrogation. App. 11a-14a. It stated that the abrogation "issue is whether the FMLA is congruent and proportional to the identified Fourteenth Amendment violation - employment discrimination on the basis of sex." App. 12a. It stated that "Congress did not identify, as it is required to do, any pattern of gender discrimination by the states with respect to the granting of employment leave for the purpose of providing family or medical care." App. 13a.

Moreover, it concluded that "the FMLA is simply not tailored to redress the asserted Fourteenth Amendment harm of gender discrimination," reasoning "that the FMLA bestows on private parties a broad-ranging substantive entitlement to sue states for a range of personnel practices without any finding that the states were culpable of an Equal Protection violation to begin with." App. 13a. In the Court of Appeals' words, "[i]nstead of attempting to remedy the identified violation, Congress attempted to "redefine the right" by creating a substantive entitlement to leave. App. 13a.

While it thus affirmed the District Court's conclusions concerning WMATA, the Fourth Circuit reversed that Court's holding regarding the supervisors. It held, first, that Lizzi has sued the supervisors in only their official capacity. App. 15a. In support, it stated that the complaint does not specify the capacity in which the supervisors were sued and then inferred from various aspects of the complaint that the supervisors are official-capacity defendants only. App. 15a. The Court of Appeals did not consider the "course of proceedings," in which the parties and the District Court treated the supervisors as individual capacity defendants. App. 15a.

Next, the Court of Appeals held that, even if the complaint had specified that the supervisors were being sued in their individual capacity, Lizzi couldn't sue them in that capacity. App. 15a-17a. It reasoned that the real party in interest in FMLA lawsuits against state officials is the state itself and determined that this Court's holding in Hafer v. Melo, 502 U.S. 21 (1991), which permits individual-capacity claims against state officials under 42 U.S.C. § 1983, is inapposite. App. 16a-17a.

REASONS FOR GRANTING THE WRIT

I. By Holding That The WMATA Interstate Compact, Which Says That WMATA May "Sue And Be Sued" And That United States District Courts Shall Have Jurisdiction Over Suits Against WMATA, Does Not Waive Eleventh Amendment Immunity, The Fourth Circuit Contradicted This Court's Holdings, In Port Authority Trans-Hudson Corp. v. Feeney And Petty v. Tennessee-Missouri Bridge Comm., That Such Consent-To-Suit And Federal-Court-Venue Provisions Waive The Eleventh Amendment Immunity Of Interstate-Compact Entities.

Sections 12 and 81 of WMATA's Compact state, respectively, that WMATA may "sue and be sued" and that the "United States District Courts shall have original jurisdiction ... of all suits brought by or against WMATA." Under this Court's precedent, these provisions waive Eleventh Amendment immunity.

In Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299 (1990), this Court held that a "consent to suit" provision governing an interstate compact, read together with a federal-court-venue clause, waived such immunity. Likewise, in Petty v. Tennessee-Missouri Bridge Comm., 359 U.S. 275 (1959), it held that an interstate compact's sue-and-be-sued clause, together with a federal-court-venue provision, effected such a waiver.

Lizzi asserted below that, under Feeney and Petty, §§ 12 and 81 waive Eleventh Amendment immunity. But the Fourth Circuit disagreed - by wrongly interpreting § 80 of the Compact. Section 80 says in relevant part:

> [WMATA] shall be liable for its contracts and for its torts and those of its Directors, officers, employees and agent[s] committed in the conduct of any proprietary function, in accordance with the law of the applicable signatory (including rules on conflict of laws), but shall not be liable for any torts occurring in the performance of a governmental function. The exclusive remedy for such breach of contracts and torts for which [WMATA] shall be liable, as herein provided, shall be by suit against [WMATA].

The Fourth Circuit concluded that § 80 "delineates the entire scope of WMATA's consent to be sued," and that therefore it would be inappropriate to construe §§ 12 and 81 as a waiver of Eleventh Amendment immunity. App. at 11a. It relied principally upon Morris v. WMATA, 781 F.2d 218 (D.C. Cir. 1986). App. 10a-11a. For numerous reasons, both the Fourth Circuit and Morris were wrong.

First, § 80's language signals that it applies only to state-law claims. It says that WMATA "shall be liable for contracts and torts in accordance with the law of the applicable signatory." Since the only signatories to the WMATA Compact are Maryland, Virginia, and the District of Columbia, this phrase can't be interpreted as a reference to federal-law claims. The Fourth Circuit offers no

explanation for its contrary conclusion. Moreover, § 80's language is strikingly similar to – and in fact analogous to - the provision in the Federal Tort Claims Act (the "FTCA") which allows the United States to be sued for torts "in accordance with the law of the place where the act or omission occurred," a provision which unquestionably addresses only state-law claims. Indeed, the District of Columbia Circuit has based its interpretation of § 80 on the case law construing this FTCA provision. Sanders v. WMATA, 819 F.3d 1151, 1155 (D.C. Cir. 1987).

Second, in the two cases which Morris cites for its suggestion - in a footnote - that the Compact effects no waiver of Eleventh Amendment immunity - Florida Dept. of Health and Rehabilitative Serv. v. Florida Nursing Home, 450 U.S. 147 (1981), and Trotman v. Palisades Interstate Park Comm., 557 F.2d 35 (2d Cir. 1977), no federal-court-venue clauses accompanied the suability clauses that were present.

Third, Morris did not address the impact of § 81 on the immunity issue. It predated Feeney and didn't consider Petty. Yet Feeney and Petty provide controlling guidance.

Fourth, the relationship between §§ 12 and 80 is analogous to the relationship between the sue-and-be-sued clauses in the legislative schemes creating federal agencies and the provisions of the FTCA which govern state law tort claims against those agencies. In that relationship, the sue-and-be-sued clause effects a broad waiver of immunity from claims, while the FTCA applies state-law principles to state-law-tort claims brought against those agencies. This relationship is described in FDIC v. Meyer, 510 U.S. 471 (1994), and Global Mail Serv. Ltd. v. United States Postal

Serv., 142 F.3d 208, 210-11 (4th Cir. 1998). Once this relationship is understood, the peaceful coexistence of §§ 12, 80, and 81 becomes clear. And that harmony enables §§ 12 and 81 to effect the waiver described in Feeney and Petty, while §80 applies traditional state-law principles to traditional state-law claims.

Fifth, the Fourth Circuit wrongly ignores - indeed nullifies - the meaning of the sue-and-be-sued clause in § 12 of the Compact. Federal law governs the interpretation of § 12, since the WMATA Compact - and all interstate compacts - are federal law. Cuyler v. Adams, 449 U.S. 443, 440 (1981)("Where Congress has authorized the States to enter into a cooperative agreement, and where the subject matter of that agreement is an appropriate subject matter for congressional legislation, the consent of Congress transforms the States' agreement into federal law under the Compact Clause of the Constitution."); Beebe v. WMATA, 129 F.3d 1283, 1288 (D.C. 1997)(same); Trotman v. Palisades Interstate Park Comm., 557 F.2d 35, 39 (2d Cir. 1977)(stating that "the meaning of sue-and-be-sued clauses in an interstate compact turns on federal rather than state law"). And this Court has clarified that, under federal law, sue-and-be-sued clauses are a broad waiver of immunity. FDIC v. Meyer, 510 U.S. 471, 475 (1994); Loeffler v. Frank, 486 U.S. 549, 554 (1988)("Congress ... has waived the sovereign immunity of certain federal entities from the times of their inception by including in the enabling legislation provisions that they may sue and be sued."); Federal Housing Admin. v. Burr, 309 U.S. 242, 245 (1940). Disregarding this precedent, the Fourth Circuit accords the sue-and-be-sued clause in § 12 no weight at all. Instead, it strains § 80's words and meaning. But as previously explained, § 80 by its terms has nothing to do with federal-law claims.

Sixth, in College Savings Bk. v. Florida Prepaid Postsecondary Educ. Exp. Bd., 527 U.S. 666 (1999), this Court, while holding that sovereign immunity shielded a state from a federal trademark claim, expressly recognized that cases – (such as Petty) - involving interstate-compact agencies present a "fundamentally different" immunity analysis, since states cannot form such agencies without Congress' approval - an approval that is a "gratuity" which Congress can withhold in the absence of a waiver of Eleventh Amendment immunity. The Fourth Circuit failed to apply that "fundamentally different" analysis.

II. The Fourth Circuit's Holding That The FMLA Doesn't Abrogate Eleventh Amendment Immunity Conflicts With This Court's Federalism Decisions.

Like the Fourth Circuit, various other Circuits have held that the FMLA, or certain of its provisions, do not abrogate Eleventh Amendment immunity. Laro v. New Hampshire, 259 F.3d 1 (1st Cir. 2001); Townsel v. State of Missouri, 233 F.3d 1094 (2d Cir. 2000); Chittister v. Department of Comm. & Econ. Dev., 226 F.3d 223 (3rd Cir. 2000); Kazmier v. Widmann, 225 F.3d 519 (5th Cir. 2000); Sims v. University of Cincinnati, 219 F.3d 559 (6th Cir. 2000); Hale v. Mann, 219 F.3d 61 (2d Cir. 2000); Garrett v. University of Alabama, 193 F.3d 1214 (11th Cir. 1999), rev'd on other grounds, 121 S.Ct. 968 (2001).

But dissenting opinions in the First, Fifth, and Eleventh Circuits have persuasively argued that those Courts have misapplied this Court's recent federalism decisions. Laro, 259 F.3d at 41-65; Kazmier, 225 F.3d at 533-49;

Garrett, 193 F.3d at 1227-35. And a district court in the First Circuit has held that the FMLA's conferral of family – as opposed to personal - leave abrogates Eleventh Amendment immunity. Serafin v. Connecticut Dept. of Mental Health & Addiction Serv., 118 F. Supp.2d 274, 275-78 (D. Conn. 2000).

The need for this Court's review of this issue becomes clear upon scrutiny of the Fourth Circuit's reasons for holding that the FMLA doesn't nullify the States' Eleventh Amendment immunity – reasons which echo its sister circuits' rationales.

In addressing abrogation, the Fourth Circuit stated that "the issue ... is whether the FMLA is congruent and proportional to the identified Fourteenth Amendment violation – employment discrimination on the basis of sex." App. 12a. It then offered its reasoning for saying "no" to this question. App. 12a-14a.

First, it stated that while the FMLA identifies gender discrimination as the constitutional harm to be remedied, "Congress did not identify, as it is required to do, any pattern of gender discrimination by the states with respect to the granting of employment leave for the purpose of providing family or medical care." App. 13a.

As an initial matter, however, it is highly questionable whether Congress was required to recite extensive state-sponsored gender discrimination before passing the FMLA to combat it. The Kazmier dissent demonstrated that "when Congress is exercising its concurrent power and duty to enforce the Equal Protection Clause of the Fourteenth Amendment on behalf of a group

which has been identified as a suspect or quasi-suspect class by the Supreme Court, [it] is not required to prove past or potential government discrimination against that class before proceeding to enact rational means of remedying, preventing or deterring the risk of future violations of the constitutional rights of members of that suspect class." 225 F.3d at 543. Of course, each gender is a quasi-suspect class under this Court's precedent.

Also, even if Congress was required to find sex discrimination by the States before enacting the FMLA, it did so. As the Garrett dissent observed, Congress found, during the legislative inquiry preceding passage of the FMLA, that both men and women suffered discrimination with respect to leave time. Id. at 1228-29. "Particularly relevant in this Eleventh Amendment context," the dissent noted, "is that Congress found that public sector employees were suffering comparable sex discrimination problems with regard to leave time as employees in the private sector." Id. at 1230 & n. 13. Likewise, the Kazmier dissent stated that "[t]estimony in hearings throughout the legislative process demonstrated that such discrepancies occurred in both the public and private sectors." 225 F.3d at 548. That testimony, which is cited in the Kazmier dissent, 225 F.3d at 548, is substantial.

After wrongly ascribing to Congress a fatal failure to identify gender discrimination by the States, the Fourth Circuit went on to determine that "the FMLA is simply not narrowly tailored to redress the asserted Fourteenth Amendment harm of gender discrimination." App. 13a. According to the Court of Appeals, the "difficulty is that the FMLA bestows on private parties a broad-ranging substantive entitlement to sue states for a range of personnel

practices without any finding that the states were culpable to begin with," and thus is an attempt by Congress to "redefine the right" rather than remedy an Equal Protection Clause violation. App. 13a. The Garrett dissent refuted this reasoning, stating as follows:

> Congress determined that a mere negative imperative upon employers, in the form of a law prohibiting them from discriminating in the granting of employee leave time on the basis of sex, was insufficient because it had already proven inadequate under Title VII, which already mandated that employers who granted parental leave had to do so equally between the sexes, *see* 42 U.S.C. § 2000e-2(a), and persisted despite protections such as the Pregnancy Discrimination Act, 42 U.S.C. § 2000e-2(k), and 42 U.S.C. § 1983. Moreover, the Title VII experience also taught Congress that a mere prohibition was impracticable because it placed too great of an enforcement burden upon employees: the costs of legal challenges to asserted violations were prohibitive, and for those who did not have this problem the time spent litigating negated any eventual positive result. 193 F.3d at 1231 (footnotes omitted).

Also, the Fourth Circuit's disparaging reference to the FMLA's "substantive entitlement" overlooks this Court's recognition that "Congress' power 'to enforce' the [Fourteenth] Amendment includes the authority both to remedy and deter violation of rights guaranteed thereunder

by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." Kimel v. Florida Bd. of Regents, 528 U.S. 62, 81 (2000). Similarly, it disregards the principle, recognized by the Kazmier dissent, that a law enacted pursuant to § 5 of the Fourteenth Amendment is valid "if a court can ascertain that the measure is a rational means adopted to deter or prevent discrimination against suspect classes." 225 F.3d at 543.

Moreover, the Fourth Circuit, in striking down the FMLA as it applies to the States, failed to address certain aspects of the FMLA that ensure its congruence with the problem that it seeks to remedy and deter. As the Garrett dissent states, the FMLA contains only "limited measures." 193 F.3d at 1233. It applies only to firms employing fifty or more employees (which comprise approximately five percent (5%) of businesses); protects only employees who have worked for a covered employer for at least one year, during which they have worked at least 1250 hours; guarantees only unpaid leave; requires covered employees to give thirty days advanced notice of foreseeable leave requests, and in that instance mandates a reasonable effort not to unduly disrupt the employer's operations; and allows employers to require the certification of serious medical conditions. Id. at 1232-33. Significantly, as the Kazmier dissent also noted, Congress demonstrated a concerted effort to minimize the burden that the FMLA imposes on state employers by excluding from its coverage state employees holding high-ranking or sensitive positions. Id. at 1233 & n. 28.

Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000), also calls the Fourth Circuit's analysis into question, by distinguishing the age discrimination at issue there from the

gender discrimination targeted by the FMLA. It states that "[a]ge classifications, unlike governmental conduct based on race or gender, cannot be characterized as 'so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy.'" Id. at 83 (quoting Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440 (1985)). It also states that "[o]lder persons, again, unlike those who suffer discrimination on the basis of race or gender, have not been subjected to a 'history of purposeful unequal treatment.'" Id. (quoting Massachusetts Bd. Of Retirement v. Murgia, 427 U.S. 307, 313 (1976)). This Court has thus indicated that, in contrast to older persons, persons who suffer gender discrimination have been subjected to a history of purposeful unequal treatment. That history obviated any need for Congress to support the FMLA's enactment with detailed evidence of gender discrimination by the States.

There is another reason for review of the abrogation issue presented by the FMLA. Several of the Circuits on which the Fourth Circuit relied have, without authority, analyzed the abrogation issue presented by the FMLA in piecemeal fashion, holding only that certain FMLA provisions do not abrogate Eleventh Amendment immunity. See Laro v. New Hampshire, 259 F.3d 1, 2 (1st Cir. 2001)(holding only the FMLA's personal-medical-leave provisions do not abrogate such immunity); Chittister v. Department of Comm. & Econ. Dev., 226 F.3d at 229 (holding that the FMLA's personal-medical-leave provisions do not abrogate such immunity); Kazmier, 225 F.3d at 522 (stating that "we conclude that the particular provisions of the FMLA that are at issue in the instant case do not validly abrogate" such immunity); Hale, 219, 221-22 (holding that the FMLA's personal-medical-leave provisions do not

abrogate such immunity, but noting that "we pass only on the particular provisions at issue here"); Garrett, 193 F.3d at 1216 (holding that "although it might well not be immune from suit under certain other provisions of the" FMLA, the States are "immune from suit under the specific provisions at issue here").

This approach to the abrogation analysis is suspect. As the Kazmier dissent states:

> [I] emphatically disagree with the majority's piecemeal, fragmented approach to a determination of whether the statute is a congruent, proportional and rational means to prevent and deter governmental and private gender based discrimination. The FMLA is a comprehensive, reticulated statute that prohibits and requires a synergism of constitutional employment practices as a rational means of deterring the difficult and intractable evils of governmental and private gender based discrimination in employment. Although a principal goal of the FMLA is to deter sex discrimination against male and female employees in granting leave time, the statute also addresses a complex of inextricably related issues and side effects, such as gender discrimination based on sexual stereotypes, counterbalancing of perceived inequities and incentives to discriminate, and the ramifications of the legislation for children and families. As the majority concedes, it has no authority to support its

> atomistic interpretative methodology by which it parses the statute into subsections, examines each in isolation, and requires that each be based on its own separate evidentiary predicate. Proceeding as the proverbial blind men examining an elephant's parts, my colleagues fail to discover the true nature of the creature as a whole. [T]he remedies implemented by the FMLA are not distinct, but rather were found interdependently necessary as a whole to effectuate Congress' stated purpose to deter and prevent unconstitutional discrimination. 225 F.3d at 544.

III. The Fourth Circuit's Holding That The Eleventh Amendment Shields State Officers From FMLA Liability Not Only Conflicts With A Tenth Circuit Holding That Imposes Individual-Capacity Liability On Government Officials For FMLA Violations And The Holdings Of Various Circuits That The Eleventh Amendment Does Not Immunize State Officers From Individual-Capacity Liability, But Also Contradicts This Court's Holding In Hafer v. Melo.

The Fourth Circuit held that government officials enjoy Eleventh Amendment immunity from suits brought against them in their individual capacity for FMLA violations. App. 14a-17a. In Wascura v. Carver, 169 F.3d 683, 686 (11th Cir. 1999), the Eleventh Circuit, in a much-criticized decision, reached the same conclusion. And in

Kazmier, supra, the Fifth Circuit so held in conclusory fashion. 225 F.3d at 533 n. 65.

In direct conflict with those Circuits, the Tenth Circuit recently held, in Cornforth v. University of Okla. Bd. of Regents, 263 F.3d 1129, 2001 U.S. App. LEXIS 18512 (10th Cir. 2001), that state officers may be held personally liable for FMLA violations. The Tenth Circuit squarely rejected the Fourth Circuit's reasoning. First, it determined that this Court's holding in Hafer does control, stating as follows:

> As a general rule, suits seeking damages from state officials in their individual capacities are not barred by the Eleventh Amendment. See Hafer [v. Melo], 502 U.S. at 21, 30-31; Papasan v. Allain, 478 U.S. 265, 277 n. 11 (1986). "[A] suit for money damages may be prosecuted against a state officer in his individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself, so long as the relief is sought not from the state treasury but from the officer personally." Alden v. Maine, 527 U.S. 706, 757 (1999). The Eleventh Amendment is not implicated in such suits because any award of damages will be satisfied from the individual's personal assets and will not be paid from the state treasury. 2001 U.S. App. LEXIS 18512 at *8.

Also, the Cornforth court rejected the Fourth Circuit's suggestion that the state is the real party in interest

in individual-capacity suits brought against its officers. It said:

> Barringer [, the defendant state officer,] ... contends that an award of damages to Cornforth would effectively compel the [state] University to comply with FMLA. Thus, he argues, the University is the real party in interest and the Eleventh Amendment bars federal courts from hearing Cornforth's FMLA claims against him for damages.... Presumably, Barringer believes that an award of damages against him will prompt the University to comply with FMLA either to protect its employees from personal liability or to avoid any obligation it may have to indemnify its employees.
>
> Barringer's argument, however, is based purely on conjecture and he has failed to demonstrate or even argue that a judgment against him individually for damages would legally *require* the University to comply with FMLA. The University may choose to comply with FMLA for any number of reasons, and Barringer has not demonstrated that a decision by the University to comply with FMLA in the wake of a damage award against him is any less a voluntary act than a state's choice to indemnify its employees. The compliance and any attendant costs would, in no way, be forced upon the

> University by the outcome of the federal suit, but would constitute a purely voluntary choice on the part of the University. 2000 U.S. App. LEXIS 18512, at *9-11.

In further conflict with the holdings of the Fourth and Eleventh Circuits in this case and Wascura, the Seventh Circuit, in Luder v. Endicott, 253 F.3d 1020 (7th Cir. 2001)(Posner, J.), recently held as follows in a case brought against state officers under the Fair Labor Standards Act (the "FLSA"), the statutory scheme on which the FMLA is largely based:

> The application of the Eleventh Amendment to suits against state officials in their individual capacity depends on the circumstances. The general rule is that such suits are not barred by the amendment, because the plaintiff is seeking damages from individuals rather than from the state treasury....
>
> .... But even when a suit is against a public officer in his or her individual capacity, the court is obliged to consider whether it may really and substantially be against the state. Id. at 1022-23.

In so holding, the Seventh Circuit rejected the Eleventh Circuit's holding in Wascura, stating that "the [reasoning] on which the Eleventh Circuit relied had been swept away by the Supreme Court in Hafer." Id. at 1022.

The Fourth Circuit's holding in this case conflicts with not only the holdings of the Tenth and Seventh Circuits in Cornforth and Luder, but also the holdings of various Circuits (including the Fourth in a prior case), district courts, and at least one state appellate court that state officials can be held liable in their individual capacity. Bankston v. Illinois, 60 F.3d 1249, 1257 (7th Cir. 1995) (affirming without comment an FLSA damage award against a state official in his individual capacity); Lee v. Coahoma Co., 937 F.2d 220, 226 (5th Cir. 1991), mandate reissued as amended, 37 F.3d 1068 (1991)(holding that a county sheriff "clearly falls within the class of managerial personnel considered employers by the FLSA"); Richard Anderson Photography v. Brown, 852 F.2d 114, 122 (4th Cir. 1988), cert. denied, 489 U.S. 1033 (1989)(holding that a state officer can be held personally liable in federal court for violating the Copyright Act, and stating that "[t]he mere fact that her conduct was undertaken in the course of her state employment does not of course relieve her of individual liability, even if her employer could not be sued for it"); Hartman v. Regents of Univ. of Colo., 22 P.2d 524, 2000 Colo. App. LEXIS 1177, at *16-19 (Colo. Ct. App. 2000), cert. granted sub nom., Middleton v. Hartman, 2001 Colo. LEXIS 336 (2001); Mosley v. Douglas Co. Correctional Ctr., 2000 U.S. Dist. LEXIS 6810, at *7-8 (D. Neb. 2000).

Aside from exacerbating this conflict, the Fourth Circuit's holding contradicts this Court's holding in Hafer. The Fourth Circuit suggests that Hafer is inapposite, stating that Hafer was based on § 1983 and that "unlike § 1983, the FMLA is not focused against those who carry the badge of authority of a State." App. 16a. But, remarkably, it cites no authority for this statement. And the FMLA's definition of

employer - which express encompasses public entities and their agents - disproves it.

In trying to distance Hafer, the Fourth Circuit also says that "[w]hereas § 1983 is intended as a broad enforcement vehicle to bring suit against state officials for violations of all other federal statutory and constitutional rights, the FMLA is focused on creating a set of statutory entitlements in its own right." App. 16a. It fails, however, to explain how any such distinction compels the conclusion that state officials are personally immune from federal-court lawsuits alleging FMLA - as opposed to § 1983 - violations. It also cites no authorities supporting that notion, which Cornforth rejects.

The Fourth Circuit further states that "the text of the FMLA does not contain the well-established system of immunities which § 1983 defendants can assert." App. 16a. Yet it provides no explanation of how the absence in the FMLA text of specific reference to immunities endows state officials with Eleventh Amendment immunity. Indeed, even the text of § 1983 doesn't specifically mention any immunities.

Next, the Fourth Circuit states that "[t]o hold that individual supervisors, as 'employers,' may be sued under the statute, while also holding that the Constitution prohibits the state itself from being sued would undermine the Supreme Court's decisions in Garrett, Kimel and Seminole Tribe." App. 16a-17a. Such a holding would, in the Court of Appeals' words, "create ... an anomaly" under which '[t]he state would still suffer the indignity of having each decision regarding personnel or organization matters subject to second-guessing by a federal court.'" App. 17a. Yet neither

Garrett, Kimel, nor Seminole Tribe addresses personal-capacity immunity, and this Court reached those decisions only after holding in Hafer that government officials are not personally immune from § 1983 actions. Moreover, the Fourth Circuit's attempt to distinguish FMLA claims from § 1983 actions flies in the face of this Court's statement in Alden v. Maine, 527 U.S. 706 (1999),, that "[e]ven a suit from money damages may be prosecuted against a state officer in his individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself, so long as the relief is sought not from the state treasury, but from the officer personally." Id. at 757. The Alden Court so stated in considering not a § 1983 claim, but a claim brought under the FLSA.

In sum, the Fourth Circuit's decision merits review because it conflicts with decisions of other Circuits and contradicts this Court's precedent.

IV. In Hafer v. Melo, This Court Recognized, But Did Not Resolve, An Inter-Circuit Conflict Concerning The Proper Method For Determining, In Instances Where The Complaint Does Not Specify, Whether State Officers Have Been Sued In Their Individual Or Official Capacity. The Fourth Circuit, By Reviewing Only The Complaint - Rather Than The "Course Of Proceedings" - To Determine Whether Government Officials Were Sued In Their Individual Or Official Capacity, Adopted An Approach That, While Consistent With The Method Employed By The Sixth And Eighth Circuits, Conflicts With The "Course-Of-

Proceedings" Approach Used By Not Only The Second, Third, Fifth, Seventh, Ninth, Tenth, Eleventh, And District of Columbia Circuits, But Also The Fourth Circuit Itself In Prior Cases.

Ten years ago, in Hafer v. Melo, 502 U.S. 21 (1991), this Court noted the existence of an inter-circuit conflict concerning the proper method for determining the capacity in which government officials have been sued if the complaint does not specify. Id. at 24 (asterisked note). It noted that certain circuits look to the "proceedings below" to make this determination, while others "impose a more rigid pleading requirement." Id.

This conflict persists, and is presented by this case. Lizzi's complaint names various state officers as defendants, but does not expressly state whether they were sued in the their official or individual capacity. But the "course of proceedings" clarifies that Lizzi was suing them in their individual capacity. In his memorandum opposing summary judgment, Lizzi stated: "In addition to WMATA, plaintiff has sued various individuals ... in their individual capacities." Likewise, the state officers themselves acted as individual-capacity defendants throughout, stating at the summary judgment stage that they "are entitled to Eleventh Amendment immunity on individual capacity claims as well." And, in its memorandum opinion, the District Court stated: "Plaintiff also brings his FMLA claim against six individual employees of WMATA in their individual capacities." App. 30a.

The Fourth Circuit nonetheless noted that the complaint doesn't expressly state the capacity in which the

government officials were sued and proceeded to review only the complaint to (purportedly) divine the capacity in which they were sued. App. 15a-16a. It completely ignored the "course of proceedings" following the complaint.

Like the Fourth Circuit in this case, the Sixth and Eighth Circuits' have held that a complaint which doesn't specifically state that a government official is being sued in his individual capacity will be interpreted as an official-capacity action only - without any examination of the ensuing "course of proceedings." Artis v. Francis Howell North Band Booster Ass'n, 161 F.3d 1178, 1182 (8th Cir. 1998)("If the complaint does not specifically name the defendant in his individual capacity, it is presumed he is sued only in his official capacity."); Wells v. Brown, 891 F.2d 591, 592 (6th Cir. 1989)(holding that a plaintiff seeking damages from a government official in his individual capacity must specify this in his complaint). A district court in the First Circuit has also adopted this approach. Charron v. Picano, 811 F. Supp. 768, 772 (D. R.I. 1993)("Although the question is one of first impression in the First Circuit, it appears to this Court that the 'bright line' rule adopted by the Sixth and Eighth Circuits is preferable....").

By contrast, the majority of circuits - including the Fourth Circuit before this case - have held that when a complaint is silent as to whether a government official has been sued in his official or individual capacity, the court should review the "course of proceedings" to resolve the issue. Frank v. Relin, 1 F.3d 1317, 1326 (2d Cir. 1993), cert. denied, 510 U.S. 1012 (1993)("[W]hen the face of a complaint fails to state clearly whether a government official is being sued in his official capacity, or his individual capacity, or both, courts look to the 'course of proceedings' to

determine" this."); Melo v. Gurley, 912 F.2d 628, 635-36 (3rd Cir. 1990), aff'd, 502 U.S. 21 (1991); Biggs v. Meadows, 66 F.3d 56, 60 (4th Cir. 1995); Parker v. Graves, 479 F.2d 335, 336 (5th Cir. 1973); Conner v. Reinhard, 847 F.2d 384, 394 n. 8 (7th Cir. 1988), cert. denied, 488 U.S. 856 (1988); Price v. Akaka, 928 F.2d 824, 828 (9th Cir. 1990), cert. denied, 502 U.S. 967 (1991); Pride v. Various John Does, 997 F.2d 712, 715 (10th Cir. 1993)("[W]here the complaint fails to specify the capacity in which the government official is sued, we look to the substance of the pleadings and the course of proceedings...."); Jackson v. Georgia Dept. of Transp., 16 F.3d 1573, 1575 (11th Cir. 1994)("When it is not clear in which capacity the defendants are sued, the course of proceedings typically indicates the nature of the liability sought to be imposed."); Atchinson v. District of Columbia, 73 F.3d 418, 425 (D.C. Cir. 1996).

This inter-circuit confusion has lasted long enough and should be resolved. Review by this Court will provide long-awaited clarity in this oft-litigated area of law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. Alternatively, this Court should summarily reverse the holdings of the Fourth Circuit addressed herein.

Respectfully Submitted,
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